1990

State of Utah v. Michael Lewis Green aka James Alvin Douglas : Petition for Writ of Certiorari

Utah Supreme Court

R. Paul Van Dam; Attorney General; Barbara Bearnson; Assistant Attorney General; Attorneys for Petitioner.
Daniel R. Knowlton; Attorney for Respondent.

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Petitioner,	:	Case No. 900329
v.	:	
MICHAEL LEWIS GREEN, aka JAMES ALVIN DOUGLAS,	:	Priority No. 13
Defendant-Respondent.	:	

PETITION FOR WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS FROM ITS OPINION REVERSING DEFENDANT'S CONVICTIONS FOR MANUFACTURING A CONTROLLED SUBSTANCE AND POSSESSION WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE, BOTH SECOND DEGREE FELONIES, IN VIOLATION OF UTAH CODE ANN. §§ 58-37-8(1)(a)(i) and (iv) (SUPP. 1988) AND ITS DECLARATION AS UNCONSTITUTIONAL TWO SUBSECTIONS OF THE UTAH CONTROLLED SUBSTANCES ACT, UTAH CODE ANN. §§ 58-37-3(3) AND, IN PART, 58-37-2(4).

R. PAUL VAN DAM (3312)
Attorney General
BARBARA BEARNSON (3986)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1021

Attorneys for Petitioner

DANIEL R. KNOWLTON
434 East South Temple, Suite 2
Salt Lake City, Utah 84111

Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Petitioner,	:	Case No.
v.	:	
MICHAEL LEWIS GREEN, aka JAMES ALVIN DOUGLAS,	:	Priority No. 13
Defendant-Respondent.	:	

PETITION FOR WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

- -- - - - - - - - - -

PETITION FOR WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS FROM ITS OPINION REVERSING DEFENDANT'S CONVICTIONS FOR MANUFACTURING A CONTROLLED SUBSTANCE AND POSSESSION WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE, BOTH SECOND DEGREE FELONIES, IN VIOLATION OF UTAH CODE ANN. §§ 58-37-8(1)(a)(i) and (iv) (SUPP. 1988) AND ITS DECLARATION AS UNCONSTITUTIONAL TWO SUBSECTIONS OF THE UTAH CONTROLLED SUBSTANCES ACT, UTAH CODE ANN. §§ 58-37-3(3) AND, IN PART, 58-37-2(4).

R. PAUL VAN DAM (3312)
Attorney General
BARBARA BEARNSON (3986)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1021

Attorneys for Petitioner

DANIEL R. KNOWLTON
434 East South Temple, Suite 2
Salt Lake City, Utah 84111

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

CONSTITUTIONS, STATUTES AND RULES

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff/Petitioner,	:	Case No.
v.	:	
MICHAEL LEWIS GREEN, aka JAMES ALVIN DOUGLAS,	:	Category Thirteen
Defendant/Respondent.	:	

PETITION FOR WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

- - - - - - - -

QUESTION PRESENTED FOR REVIEW

Whether the Utah Court of Appeals erroneously reversed respondent's conviction for manufacturing a controlled substance and possession with intent to distribute a controlled substance and declared two subsections of the Utah Controlled Substances Act, Utah Code Ann. §§ 58-37-3(3) and, in part, 58-37-2(4), to be unconstitutional. Specifically, whether the Court erred in its interpretation of State v. Gallion, 572 P.2d 683 (Utah 1977), and its conclusion that these provisions of the Act violate article VI, section 1 of the Utah Constitution because the provisions incorporate the federal schedules of enumerated controlled substances, as contained in the Federal Controlled Substances Act, into the Utah schedules of enumerated controlled substances.

OPINION BELOW

State v. Green, No. 890222-CA (Utah Ct. App. May 23, 1990) (included as Appendix A).

JURISDICTION OF THIS COURT

This is a petition for writ of certiorari to the Utah Court of Appeals based upon its reversal of defendant's convictions for manufacturing a controlled substance and possession with intent to distribute a controlled substance, in violation of Utah Code Ann. §§ 58-37-8(1)(a)(i) and (iv) (Supp. 1988), respectively, and its declaration of two subsections of the Utah Controlled Substances Act, Utah Code Ann. §§ 58-37-3(3) and, in part, 58-37-2(4) (Supp. 1988), unconstitutional. The opinion was filed on May 23, 1990. No petition for rehearing was filed. On June 19, 1990, this Court granted an extension of time in which to file this petition to July 8, 1990. This Court has jurisdiction over this petition pursuant to Utah Code Ann. §§ 78-2-2(3)(a) and (5) (Supp. 1990).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Const. art. VI, § 1 (in relevant part):

> The Legislative power of the State shall be vested:
> (1) In a Senate and House of Representatives which shall be designated the Legislature of the State of Utah.
> (2) In the people of the State of Utah, as hereinafter stated . . . .

Utah Const. art. V, § 1:

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Utah Code Ann. § 58-37-3(3) (Supp. 1988):

> (3) Whenever any substance is designated, rescheduled or deleted as a controlled substance in schedules I, II, III, IV or V or the Federal Controlled Substances Act (Title II, P.O. 91-513), as such schedules may be revised by Congressional enactment or by administrative rule of the United States Attorney General adopted pursuant to § 201 of that act, that subsequent designation, rescheduling or deletion shall govern.

Utah Code Ann. § 58-37-2(4) (Supp. 1988):

> (4) "Controlled substance" means a drug, substance, or immediate precursor included in schedules I, II, III, IV or V of Section 58-37-4, and also includes a drug, substance, or immediate precursor included in schedules I, II, III, IV or V of the Federal Controlled Substances Act, Title II, P.L. 91-513, as those schedules may be revised to add, delete, or transfer substances from one schedule to another, whether by Congressional enactment or by administrative rule of the United States Attorney General adopted under Section 201 of that act. Controlled substance does not include distilled spirits, wine, or malt beverages, as those terms are defined or used in Title 32A, regarding tobacco or food.

STATEMENT OF THE CASE

Respondent, Michael Lewis Green, was charged with two second degree felonies, manufacturing a controlled substance and possession with intent to distribute a controlled substance in violation of Utah Code Ann. §§ 58-37-8(1)(a)(i) and (iv) (Supp. 1988), respectively. Respondent was convicted in the First District Court, Box Elder County, the Honorable Gordon J. Low, presiding.

On May 23, 1990, the Utah Court of Appeals reversed the convictions and held that two subsections of the Utah Controlled Substances Act, Utah Code Ann. §§ 58-37-3(3) and 58-37-2(4) are

unconstitutional and interpreted the provisions to be inconsistent with article VI, section 1 of the Utah Constitution. Because the Court of Appeals viewed this issue as dispositive, it did not reach the remaining issues presented by respondent.

STATEMENT OF THE FACTS

Defendant was convicted of manufacturing a controlled substance and possession of a controlled substance following a jury trial on February 27 to March 2, 1989. A man who was working for defendant at his home observed what appeared to be a drug manufacturing laboratory in defendant's garage (T. 343, 346). He later reported his observations to a deputy sheriff (T. 349). After a period of surveillance of the premises, officers executed a search warrant and found a large quantity of drugs and chemicals in the garage (T. 51, 55).

Chuck Hall, a chemist for the Drug Enforcement Administration, testified that in his opinion the laboratory in defendant's garage was set up for production of phenyl-2-propanone (T. 106-07). Under Mr. Hall's direction samples were taken of thirteen chemicals. These chemicals were tested by Art Terkelson at the Weber State Crime Lab.

The samples were found to contain phenyl-2-propanone (T. 232-235) which is a precursor to the production of methamphetamine, and phenylacetic acid which is a precursor to the production of phenyl-2-propanone (113, 118). Officers found fifteen 50-gallon drums of phenylacetic acid on defendant's premises. They also found chemical formulas for the production of phenyl-2-propanone using phenylacetic acid (T. 111), and formulas for the production of phenylacetic acid (T. 112).

Following respondent's conviction, he appealed to the Utah Court of Appeals. He argued that the affidavit in support of the search warrant was insufficient to establish probable cause, that the informant was acting as an agent for the state and should be bound by the exclusionary rule, that defendant was denied due process because only samples of the chemicals were retained as evidence and the remaining amount was destroyed because it constituted hazardous waste, that the incorporation of the controlled substances contained in the federal schedules into the Utah schedules violated the separation of powers doctrine, and that the trial court erred in failing to give a requested jury instruction. The Court of Appeals reversed on the argument that the incorporation of the federal schedules was unconstitutional and, therefore, it did not reach the remaining issues.

ARGUMENT

THE COURT OF APPEALS ERRONEOUSLY REVERSED RESPONDENT'S CONVICTION AND ERRONEOUSLY DECLARED UTAH CODE ANN. §§ 58-37-3(3) & 58-37-2(4) UNCONSTITUTIONAL; THESE SUBSECTIONS OF THE UTAH CONTROLLED SUBSTANCES ACT ARE NOT INCONSISTENT WITH UTAH CONST. ART. VI, § 1.

In State v. Gallion, 572 P.2d 683 (Utah 1977) (included as Appendix B), this Court held that a provision of the Utah Controlled Substances Act that allowed the Utah Attorney General to add or delete substances from the controlled substances schedules[1] was an unconstitutional delegation of power in violation of article V, section 1 of the Utah Constitution. The provision of the Act, Utah Code Ann. § 58-37-3(2), provided:

---

[1]The controlled substances are enumerated in schedules I, II, III, IV, or V of section 58-37-4.

"The attorney general of the state of Utah shall administer the provisions of this act and may add or delete substances or reschedule all substances enumerated in the schedule in section 58-37-4 . . . ." Following the Gallion decision, the Act was revised and no longer contains this provision.

This Court, in Gallion, found the former statute to be in contravention with the separation of powers provision of article V, section 1, which provides:

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Utah Const. art. V, § 1. This Court noted that the Utah attorney general is a member of the executive department and, therefore, had an obvious potential conflict. The attorney general has the duty of challenging possible unconstitutional provisions of statutes and could be placed in the "anomalous position of exercising a potential challenge to a law he has, in fact, amended." Id. at 686.

After holding that the statute violated the separation of powers provision of article V, section 1, this Court stated that "[t]he other aspect of this case which merits response is whether the Controlled Substances Act has improperly delegated legislative power." Id. at 687. Because the attorney general determined what substances could be controlled and also scheduled the substances, the procedure allowed him, in effect, to

determine the penalty for the crime. Id. at 689. The majority concluded that a determination of the elements and punishment of a crime are exclusive functions of the legislature.

In arriving at its conclusion, this Court noted State v. Johnson, 44 Utah 18, 137 P. 632 (1913), a case in which this Court reversed the defendant's conviction for "the infamous crime against nature." Although the defendant's acts were revolting, "in the absence of legislative enactment making such acts criminal and punishable, [we cannot] denounce them as crimes. To do so would in effect be judicial legislation." Id. at 634. This Court cited article V, section 1, the separation of powers provision, in support of its holding that the Court could not judicially legislate. Relying on Belt v. Turner, 25 Utah 2d 380, 483 P.2d 425 (1971), this Court again noted that it does not have the power to judicially legislate. In Belt, the issue was whether prisoners who committed a crime before a sentencing statute was amended to provide a lesser penalty, but were sentenced after the amendment, were entitled to be resentenced under the more lenient provision. This Court stated: "The power of the legislature to repeal or amend the penalty to be imposed for a crime is not a matter of judicial concern," id. at 425, and noted that the power of the legislature to punish crime is "practically unlimited." Id. at 426 (quoting 21 Am. Jur. 2d, Criminal Law, §§ 577-78).

At no point in Gallion, or the Utah cases upon which it relied, did this Court hold that article VI, section 1[2] of the Utah Constitution precludes the legislature from incorporating into its statutory scheme statutes enacted in another jurisdiction.

A. The Court of Appeals Erred in Reaching the Issue of the Constitutionality of the Provisions of the Controlled Substances Act.

"It is a well-established rule that legislative enactments are endowed with a strong presumption of validity and will not be declared unconstitutional unless there is no reasonable basis upon which they can be construed as conforming to constitutional requirements." In re Criminal Investigation, 7th Dist. Court No. CS-1, 754 P.2d 633, 640 (Utah 1988) (citing Greaves v. State, 528 P.2d 805, 806-07 (Utah 1974)). See also State v. Hoffman, 733 P.2d 502 (Utah 1987); Murray City v. Hall, 663 P.2d 1314 (Utah 1983). The appellate court must look to the "reasonable or actual legislative purpose" in evaluating constitutional challenges. Id. The burden is on the challenging party to establish the unconstitutionality of the statute. Rio Algom Corp. v. San Juan County, 681 P.2d 184 (Utah 1984). All doubts are resolved in favor of constitutionality. Ellis v. Social Service Dept. of the Church of Jesus Christ of Latter-Day Saints, 615 P.2d 1250 (Utah 1980).

---

[2]Utah Const. art. VI, § 1: "The Legislative power to the State shall be vested: 1. In a Senate and House of Representatives which shall be designated the Legislature of the State of Utah. 2. In the people of the State of Utah, as hereinafter stated . . . ."

Further, if a case can be disposed of on some other ground, an appellate court should not reach the issue of the constitutionality of a statute. State v. Anderson, 701 P.2d 1099, 1103 (Utah 1985) ("It is a fundamental rule that this Court should avoid addressing constitutional issues unless required to do so."). See also State v. Wood, 648 P.2d 71 (Utah 1982), cert. denied, 459 U.S. 988 (1982), limited on other grounds, State v. Eloge, 762 P.2d 1, 2 (Utah 1988); Goodsel v. Department of Business Regulation, 523 P.2d 1230 (Utah 1974).

In the present case, evidence at trial established that P-2-P, the substance at issue, was a precursor to methamphetamine (T. 118). Under the Utah Controlled Substances Act, as it existed in 1988 and absent any reliance on the Federal Act, P-2-P was controlled. Methamphetamine is a schedule II drug. Utah Code Ann. § 58-37-4(2)(b)(iii)(B) (Supp. 1988). Under Utah law, a controlled substance includes a drug enumerated on the Utah schedules and its immediate precursors. Utah Code Ann. § 58-37-2(4). Because P-2-P is an immediate precursor to methamphetamine, the Court of Appeals did not need to reach the issue of the constitutionality of the provisions of the statutes that incorporate the federal schedules, §§ 58-37-3(3) and -4(2). Even absent the adoption of the federal schedules, respondent's manufacture and possession of P-2-P would have violated Utah law.

B. Utah Code Ann. §§ 58-37-3(3) and 58-37-2(4) Do Not Provide For An Unconstitutional Delegation of Legislative Power in Violation of Article VI, Section I of the Utah Constitution.

In Green, the Court of Appeals held that the provisions that allow adoption of the federal schedules do not violate

article V, section 1, the separation of powers provision, of the Utah Constitution.

> The purpose of this state constitutional provision is to prohibit concentration of legislative and executive powers of the state government in one person. . . . As Gallion makes clear, the delegation doctrine in Utah is found in our state constitution, not in judicial decisions. The court held that, although article V, section 1 does not prohibit delegation of legislative power per se, it does bar the delegation of legislative functions to persons in the executive department, in order to avert concentration of power. . . . This holding concerning article V, section 1 is not applicable in the present case because the 1979 changes in the Act conferred Utah legislative functions upon a person outside of state government, diffusing power, not concentrating it.

State v. Green, No. 890222-CA, slip op. at 6 (Utah Ct. App. May 23, 1990).

The Court of Appeals then stated that the Gallion Court's "other holding" is dispositive in this case: Article VI, section 1 of the Utah Constitution precludes the Utah legislature's ability to delegate its powers as it has done by incorporating the federal controlled substance schedules into the Utah Act. The Court held that these provisions, Utah Code Ann §§ 58-37-3(3) and 58-37-4(2), unconstitutionally delegate the power to add P-2-P and other substances to the Utah schedules and thereby "define its manufacture or possession as a crime and fix the penalty for that crime." Green, slip op. at 6.

The United States Code provides that the United States Attorney General may by rule add, delete, or transfer a drug from the controlled substance schedules. 21 U.S.C. § 811(a) (1982). The statute mandates that the rules must be made on the record

after a hearing has been held. Id. Changes in the rules may be instigated by the attorney general on his own motion, at the request of the Secretary of Health and Human Services, or at the request of any interested party. Id.

The federal act specifies standards and safeguards under which substances can be added or deleted to limit arbitrary or scientifically unsound changes in the schedules. See, e.g., 21 U.S.C. 811(b) and (c) (1982).

Section 812 governs the scheduling procedure and requires, with limited exceptions, that requisite findings be made before a drug is placed on a particular schedule. For example, to be placed on schedule I, there must be findings that the drug has high potential for abuse, the drug has no medically accepted use in treatment, and that there is a lack of accepted safety for the use of the drug under medical supervision. 21 U.S.C. 812(b)(1) (1982). The remaining four schedules require similar types of findings. Thus, the substances cannot be added to a particular schedule based upon administrative whim.

Numerous challenges have been made in the federal courts to this delegation of authority by Congress to the Attorney General. The federal courts have universally held that the delegation meets constitutional scrutiny. See, e.g., United States v. Emerson, 846 F.2d 541 (9th Cir. 1988); United States v. Hope, 714 F.2d 1084 (11th Cir. 1983); United States v. Alexander, 673 F.2d 287 (9th Cir.), cert. denied, 459 U.S. 876 (1982); United States v. Gordon, 580 F.2d 827 (5th Cir.), cert. denied, 439 U.S. 1051 (1978); United States v. Pastor, 557 F.2d 930 (2d

Cir. 1977); United States v. Davis, 564 F.2d 840 (9th Cir. 1977), cert. denied, 434 U.S. 1015 (1978); Iske v. United States, 396 F.2d 28 (10th Cir. 1968); United States v. Suquet, 551 F.Supp. 1194 (N.D. Ill. 1982).

The seminal United States Supreme Court case addressing the issue of legislative delegation of power is United States v. Grimaud, 220 U.S. 506 (1911). In Grimaud, the Supreme Court upheld a conviction for violating a forest grazing regulation promulgated by the secretary of agriculture. The Court noted that in enacting the Forest Reserve Act, Congress had stated that a violation of rules and regulations would be punished. Thus, Congress, not the secretary of agriculture, had determined that violations of the Act would be a crime.

This Court attempted to distinguish Grimaud in Gallion, stating that under the Utah Controlled Substance Act, the Utah attorney general (under the former provision) not only determined what substances should be controlled, but also determined the schedule and, therefore, the applicable penalty. Gallion, 572 P.2d at 688-89. Again, the statutory scheme has been revised and the Utah attorney general no longer has this authority. Still, however, the issue remains with respect to delegation of authority to penalize crimes. Other courts have examined this issue and determined that this delegation does not allow an administrator to determine that certain acts involving controlled substances are criminal, but rather grants the power to determine the chemicals that satisfy the legislative requirements for control. In United States v. Suquet, 551 F. Supp. 1194 (N.D.

Ill. 1982), the court rejected the defendant's argument that Grimaud does not allow Congress to delegate power under which the executive determines not only which particular transactions are criminal, but also the penalties to be imposed. Id. at 1197. The court stated:

> Grave constitutional questions would be present if Congress had legislated the following law:
>
> > Distribution of any substance determined by the administrator to meet the requirements for control established herein shall be illegal. The penalty for such distribution shall be as the Administrator provides by rule.
>
> See Gelhorn, Administrative Prescription and Imposition of Penalties, 1970 Wash. U.L.Q. 265, 268-71; see also United States v. Batchelder 442 U.S. 114, 125-26 . . . (1979). The Controlled Substances Act, however, is quite clearly of a different mold. Congress did not grant the Administrator the power to determine which penalties should be imposed upon which sorts of generic violations (e.g., possession with intent to distribute a Schedule II substance). Congress itself made these determinations. The Administrator was authorized to do nothing more than determine which substances belong within which Schedule. This is entirely permissible under Grimaud.

Id. at 1197-98.

The court also rejected the defendant's contention that because different schedules carry differing penalties, the administrator has too much control over the punishment to be imposed. The court stated that the argument failed for two reasons. First, the detailed criteria in sections 812(b)(1)-(5) govern on which schedule a substance will be placed. Id. at

1198. Second, there is always some discretion in a Grimaud situation. In Grimaud, the secretary could implicitly determine the penalty by determining whether or not to make grazing without a permit a crime; thus, he had at least two choices. Under the Controlled Substances Act, the secretary is, under some circumstances, given a few more options, but they are subject to rigid standards. "If the Forest Reserve Act passed muster [in Grimaud], so must the Controlled Substances Act." Id. at 1198.

Legislative delegation of power to executive and administrative agencies is essential to the operation of government. See Williams, Police Rulemaking Revised: Some New Thoughts On An Old Problem, Vol. 47: No. 4 Law & Comtemp. Prob. 148 (1984). Most other courts have held that the legislature may delegate its powers regarding criminal measures, so long as there are adequate standards and safeguards to assure that the administrator cannot abuse the discretion the legislature has conferred. See, e.g., People v. Lowrie, 761 P.2d 778 (Colo. 1988) (legislature's delegation of authority to administrative agency regarding control of alcoholic beverages was not an unlawful delegation of power to define criminal conduct); Clark County Sheriff v. Lugman, 101 Nev. 149, 697 P.2d 107 (1985) (Controlled Substances Act did not unconstitutionally delegate power to board of pharmacy to define criminal conduct); State v. Peloquin 427 A.2d 1327 (R.I. 1981) (the Controlled Substances Act did not unconstitutionally delegate legislative authority to the state director of health because the Act required the director to adopt the federal schedules or to justify the exclusion); Montoya

v. O'Toole, 94 N.M. 303, 610 P.2d 190 (1980) (allowing the state board of pharmacy to schedule drugs was not an unconstitutional delegation of authority where the authority was subject to legislative standards); State v. Crown Zellerbach Corp., 92 Wash. 2d 894, 602 P.2d 1172 (1979) (the proscribed criminal conduct was defined by the legislature; therefore, it was not improper to delegate power to an administrator to adopt regulations); State v. Kellogg, 98 Idaho 541, 568 P.2d 514 (1977) (designation of substances as controlled based upon other state laws, the federal law, or a regulation by the state board of pharmacy was not an unconstitutional delegation of authority); People v. Uriel, 57 Mich. App. 419, 225 N.W.2d 788 (1977) (Controlled Substances Act did not unconstitutionally delegate power to the board of pharmacy because there were adequate guidelines for scheduling drugs).

CONCLUSION

The State of Utah respectfully submits that the Court of Appeals has decided an important question of state law that should be settled by this Court. Based upon Rule 46(d), Utah Rules of Appellate Procedure, and the foregoing arguments and authorities, the State requests that this Court grant its petition for writ of certiorari to the Utah Court of Appeals to

review the Court's reversal of defendant's conviction and its declaration as unconstitutional two subsections of the Utah Controlled Substances Act.

DATED this 9th day of July, 1990.

R. PAUL VAN DAM
Attorney General

BARBARA BEARNSON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, to Daniel Knowlton, attorney for respondent, 434 East South Temple, Suite 2, Salt Lake City, Utah 84111, this 9th day of July, 1990.

APPENDICIES

APPENDIX A

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah, Plaintiff and Appellee, v. Michael Lewis Green, aka James Alvin Douglas, Defendant and Appellant.	)	OPINION (For Publication) Case No. 890222-CA

First District, Box Elder County
The Honorable Gordon J. Low

Attorneys: Daniel R. Knowlton, Salt Lake City, for Appellant
R. Paul Van Dam and Barbara Bearnson, Salt Lake City, for Appellee

---

Before Judges Bench, Greenwood, and Jackson.

JACKSON, Judge:

Defendant Michael Lewis Green appeals his convictions of two second-degree felonies, manufacturing a controlled substance and possession with intent to distribute a controlled substance, in violation of the Utah Controlled Substances Act, Utah Code Ann. § 58-37-8(1)(a)(i) and (iv) (Supp. 1988), respectively. We reverse.

The controlled substance involved in both counts was phenyl-2-propanone (P2P). Defendant asserts that certain provisions of the Utah Controlled Substances Act improperly delegated legislative power by permitting the United States Attorney General prospectively to add P2P as a controlled substance under the Utah criminal statute. Because it delegates the definition of the elements of, and the penalty for, a Utah crime, defendant argues, the statute violates article VI, section 1 of the Utah Constitution, which vests legislative power in the Utah Legislature.

The Utah Controlled Substances Act, enacted in 1971 Utah Laws, ch. 145 (effective January 1, 1972), established five schedules of specified drugs, Utah Code Ann. § 58-37-4 (1974), and defined a "controlled substance" in Utah Code Ann. § 58-37-2(5) (1974) as a drug, substance, or immediate precursor in those schedules. The legislature gave the Utah Attorney General prospective authority to designate a substance as an "immediate precursor," Utah Code Ann. § 58-37-2(23) (1974), and to reschedule substances, add substances to, or delete substances from the Utah schedules by following the procedures set forth in section 58-37-5. Utah Code Ann. §§ 58-37-3(2) to -3(7) (1974).

The Act was substantially amended in 1979 Utah Laws, ch. 12 (effective May 8, 1979). The definition of "controlled substance" was expanded beyond those drugs enumerated in the Utah schedules, to include a

> drug, substance, or immediate precursor included in schedules I, II, III, IV or V of the Federal Controlled Substances Act (Title II, P.L. 91-513), as those schedules may be revised to add, delete, or transfer substances from one schedule to another, whether by Congressional enactment or by administrative rule of the United States Attorney General adopted pursuant to § 201 of that act.

Utah Code Ann. § 58-37-2(4) (Supp. 1988).[1] Through 1979 Utah Laws ch. 12, § 2, the delegation of prospective authority to the Utah Attorney General in section 58-37-3(2) through -3(7) was stricken. In its place, the declaration of what substances were "controlled" was amended to add the following to those substances actually listed in the section 58-37-4 schedules:

> (2) All controlled substances listed in the Federal Controlled Substances Act (Title II, P.L. 91-513), as it is amended from time to time, are hereby controlled.

---

1. The actual amendatory language varied slightly in form, but not in content, from that in effect when Green was arrested and charged. See 1979 Utah Laws, ch. 12, § 1. Although the subsection has undergone additional stylistic changes since 1988, the definition of controlled substances in Utah Code Ann. § 58-37-2(4) (1990) remains essentially the same.

> (3) Whenever any substance is designated, rescheduled or deleted as a controlled substance in schedules I, II, III, IV or V of the Federal Controlled Substances Act (Title II, P.L. 91-513), as such schedules may be revised by Congressional enactment or by administrative rule of the United States Attorney General adopted pursuant to § 201 of that act [21 U.S.C.A. § 811], that subsequent designation, rescheduling or deletion shall govern.

Utah Code Ann. § 58-37-3 (1986).

When defendant was arrested and charged in September 1988, the Utah Controlled Substances Act, Utah Code Ann. § 58-37-8(1)(a)(i)-(iv) (Supp. 1988),[2] set forth four categories of prohibited acts involving controlled substances. The punishment for the proscribed conduct varied, as it does under the current version of the Act, depending on the schedule in section 58-37-4 in which the particular controlled substance was listed. A violation of section 58-37-8(1)(a) was punishable as a second-degree felony if it involved a substance from schedule I or II; as a third-degree felony if the substance was classified in Schedule III or IV; and as a class A misdemeanor if the substance was classified in Schedule V. Utah Code Ann. § 58-37-8(1)(b)(i)-(iii) (Supp. 1988).

---

2. Utah Code Ann. § 58-37-8(1)(a) (Supp. 1988) provided:

> (a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:
> (i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;
> (ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;
> (iii) possess a controlled substance in the course of his business as a sales representative of a manufacturer or distributor of substances listed in Schedules II through V except under an order or prescription;
> (iv) possess a controlled or counterfeit substance with intent to distribute.

In this case, Green was charged with possession and manufacture of P2P as a controlled substance. P2P was not listed as a controlled substance in the Utah schedules in section 58-37-4.[3] Nor was P2P listed as a controlled substance in the Federal Controlled Substances Act, 21 U.S.C.A. § 812 (1981), on the January 1, 1972, effective date of the Utah Controlled Substances Act, or on the May 8, 1979, effective date of the amendment of sections 58-37-2(5) and -3(3) of the Utah Act. Furthermore, P2P had not been added to the federal schedules by administrative action on those dates. However, the State asserts that P2P was administratively "added" to Utah's Schedule II after May 8, 1979, by the United States Attorney General, pursuant to the delegated authority in the 1979 amendment of sections 58-37-2(5) and -3(3). By administrative action effective February 11, 1980, the United States Attorney General placed phenylacetone (also known as phenyl-2-propanone, P2P, benzyl methyl ketone, or methyl benzyl ketone) on federal Schedule II as an immediate precursor to methamphetamine and amphetamine.[4] 21 C.F.R. § 1308.21

---

3. The Utah Controlled Substances Precursor Act, which took effect April 1, 1989, lists phenylacetic acid and phenylpropanolamine and their salts as precursor chemicals. Utah Code Ann. § 58-37c-2(5) (1990).

4. The 1979 amendment to the Utah Controlled Substances Act incorporated the Federal Controlled Substances Act, which was first enacted by Congress on October 27, 1970. 21 U.S.C.A. §§ 801 to 904 (1981). Section 811(e) allows the United States Attorney General to add "immediate precursors," defined in 21 U.S.C.A. § 802(34)(A) (Supp. 1990), to the federal schedules of controlled substances without going through the normal administrative rulemaking process otherwise necessary for scheduling a drug or substance. This summary procedure was used by the United States Attorney General to amend 21 C.F.R. § 1308.12, effective February 11, 1980, by adding the following subsection to federal Schedule II:

> (f) Immediate precursors. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances:
>
> (1) Immediate precursor to amphetamine and methamphetamine:
>
> (i) Phenylacetone-8501

(1981); 44 Fed. Reg. 71822 (1979). Green responds that, because the delegation of legislative power to the federal officer in the 1979 amendment to the Utah Act violates the Utah Constitution, federal administrative action after May 8, 1979, adding P2P to the federal schedule could not validly add P2P to the Utah schedule of controlled substances.[5]

Before Utah's amendment of the Act in 1979, as discussed above, the Utah Legislature had vested authority in the Utah Attorney General to add substances to the Utah schedules by future administrative action. That delegation of legislative power was challenged in State v. Gallion, 572 P.2d 683 (Utah 1977), and held unconstitutional, perhaps prompting the 1979 legislative changes to the Act, which simply substituted a delegation of the same prospective lawmaking authority to the United States Attorney General.

The first question in Gallion was whether the 1979 enactment had violated the separation of powers provision in Utah Constitution article V, section 1, by granting power to the Utah Attorney General to, in effect, amend the Utah Controlled Substances Act by adding, deleting, or rescheduling a controlled substance. That section of the state constitution provides:

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person

---

(Footnote 4 continued)

> Some trade or other names: phenyl-2-propanone; P2P; benzyl methyl ketone; methyl benzyl ketone.
> (2) Immediate precursors to phencyclidine (PCP):
> (i) 1-phenylcyclohexylamine-7460
> (ii) 1-piperidinocyclohexanecarbonitrile (PCC)-8603

5. Green's appeal does not involve a substance that, on the May 8, 1979, effective date of the amendment of the Utah Controlled Substances Act, was a federally scheduled controlled substance as the result of either federal administrative or congressional action. We, therefore, do not address the issue of the extent to which the Utah Legislature may, consistent with the state constitution, adopt another jurisdiction's laws and administrative rules defining the elements of a crime and the penalty therefor.

> charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

The purpose of this state constitutional provision is to prohibit concentration of legislative and executive powers of the state government in one person. See Gallion, 572 P.2d at 686. Because there is no provision in the federal constitution comparable to article V, section 1 of the Utah Constitution, the court pointed out, federal case law concerning the delegation of legislative power is not helpful in interpreting the Utah constitutional provision. Id. As Gallion makes clear, the delegation doctrine in Utah is found in our state constitution, not in judicial decisions. The court held that, although article V, section 1 does not prohibit delegation of legislative power per se, it does bar the delegation of legislative functions to persons in the executive department, in order to avert concentration of power. Id. at 687. This holding concerning article V, section 1 is not applicable in the present case because the 1979 changes in the Act conferred Utah legislative functions upon a person outside of state government, diffusing power, not concentrating it.

However, we agree with Green that the Gallion court's other holding, which pertains to the limits in Utah Constitution article VI, section 1 on the Utah Legislature's ability to delegate its legislative powers, is dispositive in his case.

Because Utah Constitution article VI, section 1 vests legislative power in the Utah Legislature, Green contends that the Utah Legislature could not constitutionally delegate to any person or agency the power to add P2P or anything else to those scheduled substances that are controlled under Utah law, and thereby define its manufacture or possession as a crime and fix the penalty for that crime.

In Gallion, a necessary element of the crime was that the proscribed conduct involve a controlled substance. There, the crime charged was the making of a false or forged prescription for a controlled substance. Here, a necessary element of the crime is that the proscribed conduct involve a controlled substance. Here, the crimes charged are the manufacture and possession of a controlled substance. In Gallion, the controlled substance, Demerol, was placed on Utah Schedule II

by the Utah Attorney General through the mandated rulemaking process, so that any proscribed conduct involving it constituted a third-degree felony. Here, once the United States Attorney General administratively added P2P as a controlled substance on Utah schedule II, any proscribed conduct involving P2P purportedly constituted a second-degree felony.

The Utah Supreme Court pointed out in Gallion, 572 P.2d at 687, that article VI, section 1 of the Utah Constitution, which vests legislative power in the Utah Legislature, limits the legislature's ability to delegate that power to others. Reiterating that there are certain "essential legislative functions" that cannot be delegated, id. at 688,[6] the Gallion court held that the "determination of the elements of a crime and the appropriate punishment therefor are, under our [Utah] Constitutional system, judgments, which must be made exclusively by the legislature." Id. at 690; see also State v. Johnson, 44 Utah 18, 137 P. 632 (1913) (it is for the legislature, not the courts, to define what constitutes criminal conduct).[7]

The Utah Supreme Court identified sound reasons for its ruling that the definition of a crime and the punishment for it are essential legislative functions that cannot be delegated to an administrative agency:[8] (1) criminal trials would be

---

6. See also Tite v. State Tax Comm'n, 89 Utah 404, 57 P.2d 734, 740-41 (1936) (power to determine amount of tax penalty is nondelegable legislative function); Western Leather and Finding Co. v. State Tax Comm'n, 87 Utah 227, 48 P.2d 526, 528 (1935) (imposition of a tax and designation of who must pay it are essential legislative functions, which legislature cannot delegate to state agency).

7. As the court noted in Gallion, 572 P.2d at 688, the state constitutional requirement that the essential legislative function of specifying and punishing conduct as criminal be performed by the legislature itself, not by administrative agency action, is incorporated into Utah Code Ann. § 76-1-105 (1978), which states: "Common law crimes are abolished and no conduct is a crime unless made so by this code, other applicable statute or ordinance."

8. Although the Utah Supreme Supreme Court has recognized that there is "a certain peril involved if administrative procedures can be applied to the criminal law," Gallion, 572 P.2d at 690, courts in other states have not been as perceptive.

unduly complicated because a defendant could challenge the administrative procedures and findings underlying the scheduling of a substance; and (2) because administrative rulings are not codified, citizens would have to resort to records outside the Utah Code to determine the status of a particular substance.[9] Gallion, 572 P.2d at 689-90.

Gallion squarely held that crime definition and penalty powers are essential legislative functions that cannot constitutionally be delegated by the Utah Legislature to any other person or body. Nonetheless, the legislature's subsequent amendment of the Act in 1979 ignored the limits on delegation of its powers in Utah Constitution article VI, section 1, articulated by the Gallion court. Because we are

---

(Footnote 8 continued)

Intentionally or not, they have permitted administrative law principles, state and federal, to creep into their decisions and dictate their criminal law. For example, see State v. Kellogg, 98 Idaho 541, 568 P.2d 514, 516-18 (1977), in which the court cited state and federal administrative law decisions and Professor Davis's treatise in a criminal case like Gallion involving the sale of a prescription drug. In Kellogg, scheduling of prescription drugs as controlled substances was statutorily delegated to the Idaho Board of Pharmacy. This delegation was upheld because the statute (1) contained a declaration of policy; (2) selected the agency to effectuate the policy; and (3) defined the limits of the Board's power. The court in Montoya v. O'Tooele, 94 N.M. 303, 610 P.2d 190 (1980), involving possession of Valium, also used administrative law concepts. There, the legislature had delegated to the State Board of Pharmacy the power to schedule drugs and controlled substances under New Mexico criminal law. The delegation was upheld because the delegation was accompanied with strict guidelines, clear standards, and definite duties. The court, using administrative law principles, found this scheme to allow the Board only minimal discretion in the fact-finding function and to give the Board no discretion in enacting substantive law.

9. The State makes a public policy argument in support of the Utah Legislature's delegation of lawmaking authority to the United States Attorney General, namely, the "enormous burden" placed on the legislature to monitor thousands of new drugs developed each year. See Kellogg, 568 P.2d at 517; Montoya, 610 P.2d at 192. There is, however, nothing in this record to support these claims.

unable to distinguish Gallion on this controlling point, we conclude that Utah Code Ann. § 58-37-3(3) (1986) and Utah Code Ann. § 58-37-2(4) (Supp. 1988), violate article VI, section 1 of the Utah Constitution insofar as they allow the United States Attorney General to add substances to the Utah schedules of controlled substances after May 8, 1979. Accordingly, P2P was not a substance controlled by the statute under which Green was charged, and we are compelled to reverse Green's convictions on this ground.

In light of this conclusion, we need not address Green's remaining arguments. However, we need to delineate the scope of our constitutional ruling.

Defendant has not challenged the entire Utah Controlled Substances Act as unconstitutional. See note 5, supra. He has attacked only the provisions added by the 1979 amendments to the Act, effective May 8, 1979, in which the United States Attorney General was granted prospective legislative power to amend the Utah statute by adding, deleting, or transferring substances on the federal schedules.

The applicable rule of statutory construction in such circumstances is that

> statutes, where possible, are to be construed so as to sustain their constitutionality. Accordingly, if a portion of the statute might be saved by severing the part that is unconstitutional, such should be done.

Celebrity Club Inc. v. Utah Liquor Control Comm'n, 657 P.2d 1293, 1299 (Utah 1982). This basic rule applies to the construction of criminal statutes. State v. Nielsen, 19 Utah 2d 66, 426 P.2d 13, 15 (1967). Where part of a statute is unconstitutional, severability is primarily a matter of legislative intent, Salt Lake City v. International Ass'n of Firefighters, 563 P.2d 786, 791 (Utah 1977), which a court ascertains by determining whether the remaining portions of the enactment can stand alone and serve a legitimate purpose. Berry v. Beech Aircraft Corp., 717 P.2d 670, 686 (Utah 1985).

The provisions challenged by Green were apparently added to the Act separately as a response, albeit an inadequate one, to the decision in Gallion. We believe the legislature intended that the remaining provisions be enforced independent of the

1979 amendments for the legitimate purpose of punishing conduct involving those substances expressly included in the schedules in section 58-37-4. The remaining provisions were enforced in this same manner during the period between the Gallion decision on November 17, 1977, and the effective date of the 1979 amendment of the Act. We conclude that Utah Code Ann. § 58-37-3(3) (1986) and the portion of Utah Code Ann. § 58-37-2(4) (Supp. 1988) delegating legislative power to the United States Attorney General are severable from the remaining portions of the Utah Controlled Substances Act.

The convictions are reversed.

Norman H. Jackson, Judge

I CONCUR:

Pamela T. Greenwood, Judge

BENCH, Judge (concurring and dissenting):

I agree that the Controlled Substances Act passes constitutional muster under article V, section 1, of the Utah Constitution. I disagree, however, with the majority's conclusion that the Act violates article VI, section 1.

When we are faced with a challenge to the constitutionality of a statute, we must adhere to the rule that "legislative enactments are endowed with a strong presumption of validity and will not be declared unconstitutional unless there is no basis upon which they can be construed as conforming to constitutional requirements." In re Criminal Investigation, 754 P.2d 633, 640 (Utah 1988) (citing Greaves v. State, 528 P.2d 805, 806-07 (Utah 1974)).

The main opinion reverses defendant's convictions on the authority of State v. Gallion, 572 P.2d 683 (Utah 1977). The narrow holding of Gallion is that the former Act was an unconstitutional violation of the separation of powers doctrine of article V since it allowed the executive in charge of

enforcing the law to exercise legislative functions. The opinion could have, and for clarity's sake, arguably should have, stopped there. Instead, it went on to talk about improper legislative delegation.

My colleagues suggest that this dicta was framed under article VI. I disagree. The legislative delegation discussion in Gallion was framed under statute and case law.[1] The statute, Utah Code Ann. § 76-1-105 (1974), provided as follows: "Common law crimes are abolished and no conduct is a crime unless made so by this code, other applicable statute or ordinance." The case, State v. Johnson, 44 Utah 18, 137 P. 632 (1913), held that under article V (not VI), courts may not denounce and punish as crimes acts and omissions not made punishable by statute.

By the Controlled Substances Act, the legislature has criminalized the manufacture, distribution, and possession of controlled substances. See Utah Code Ann. § 58-37-8(1)(a) (1990). The legislature has given a federal agency the task of identifying the particular substances to be controlled. Such delegation of responsibility is not, on its face, an unconstitutional delegation of legislative power. See Williams, Police Rulemaking Revisited: Some New Thoughts on an Old Problem, 47:4 Law & Contemp. Probs. 123 (Autumn 1984). Whether our statute is unconstitutional should turn not on article VI, but on whether the legislature has adequately identified standards and procedural safeguards for the placement of substances on the schedules. See generally, Davis, A New Approach to Delegation, 36 U. Chi. L. Rev. 713 (1969).

From a practical viewpoint, the prohibition against legislative delegation cannot be absolute. As explained by Justice Crockett in his concurring opinion in Gallion:

> [D]ue to the complexities of human society, which are ever increasing, the function of the legislative branch must necessarily be that of a general policy

---

1. In Gallion, "the Utah Supreme Court affirmed on grounds that the Constitution of Utah prohibits the legislature from delegating both legislative and executive powers to a single person, and further, that the power to define conduct as criminal is exclusively reserved to the legislature by both statute and case law." 1978 Utah L. Rev. 399 (footnotes omitted).

> making body and that it cannot spell out all of the details of the administration and application of law. Consequently, it is necessary that the executive branch (e.g., administrative agencies . . .), in order to carry out the responsibilities imposed upon them, have the power to make rules and regulations that must be complied with, and that failure to comply must have sanctions or penalties, and that they therefore must have the force of law.

572 P.2d at 690.

In addition to the Controlled Substances Act, other legislation has defined the general crime and then left to an administrative agency the responsibility of specifying the prohibited activity. As long as the rules and regulations promulgated under such legislation meet due process requirements, they should be enforceable.

I cannot reverse this case solely on the authority of Gallion.

Russell W. Bench

Russell W. Bench, Judge

APPENDIX B

of trial judge unless his judgment is clearly arbitrary or capricious and not based on the evidence.

Lyle J. Barnes, Kaysville, for plaintiff and appellant.

Robert B Hansen, Atty. Gen., Franklyn B. Matheson, Asst. Atty. Gen., Salt Lake City, Ernest W. Jones, Asst. Weber County Atty., Ogden, for defendant and respondent.

ELLETT, Chief Justice:

This case was before us in 1976 wherein Mrs. Wilson appealed from a ruling of the trial court to the effect that she, as a grandmother, had no standing to interfere with the Family Services Division in its placement of her grandson for adoption.[1] This Court reversed and held that the blood relationship between grandparent and grandchild is such that the court should have continued a stay of proceedings order until the grandmother could have her day in court.

That day as now been had. Mrs. Wilson's counsel called the members of the defendant's committee on the placement of children and tried to show that they acted arbitrarily and capriciously in placing the child in an adoptive home. He also tried to show that the committee never considered his client as a possible person to adopt the child Mrs. Wilson also gave testimony as to her ability to rear the child, etc.

The trial court heard the testimony and held that in considering the placement of the child for adoption, the defendant (respondent) did not act capriciously or arbitrarily in any manner. All the committee witnesses testified that they had seriously considered the grandmother as one to whom adoption could be permitted, but that the welfare of the child was the paramount item in making the determination that they made.

[1, 2] At the hearing from which this appeal was taken, the witnesses were still of the opinion that the child should be left in the home in which he has resided for several years past. The trial court was justified in ruling as it did, and we should not substitute our judgment for that of the trial judge unless his judgment is clearly arbitrary or capricious and not based on the evidence.

In this case, the judge learned that Mrs. Wilson had been married three times; that she refused to speak to the mother of the child; that the mother voluntarily surrendered the child to the defendant for the purpose of adoption and specifically requested that the defendant not place the child with the grandmother. The court acted properly in making its ruling.

The judgment of the trial court is affirmed. No costs are awarded.

CROCKETT, WILKINS and HALL, JJ., concur.

MAUGHAN, J., concurs in the result.

STATE of Utah, Plaintiff and Appellant,

v.

Debra Kay GALLION, Defendant and Respondent.

No. 14966.

Supreme Court of Utah.

Nov. 17, 1977.

State appealed from order of the Fourth District Court, Utah County, J. Robert Bullock, J., which quashed information which charged defendant with making a false or forged prescription for controlled substance. The Supreme Court, Maughan, J., held that: (1) provision of the Controlled

1. *Wilson v Family Services*, Utah, 554 P 2d 227 (1976)

Substances Act authorizing the Attorney General to add or delete substances from the list of controlled substances was an unconstitutional delegation of legislative power to an individual charged with exercising functions of the executive department, and (2) provision of the Controlled Substances Act violated provision of the criminal code abolishing common-law crimes and providing that no conduct is a crime unless made so by the criminal code or by other applicable statute or ordinance.

Affirmed.

Crockett, J., concurred separately and filed an opinion.

Ellett, C. J., dissented and filed an opinion.

1. Drugs and Narcotics ⇐71

Necessary element of the crime of making a false or forged prescription or written order for a controlled substance is that the proscribed conduct involve a controlled substance. U.C.A.1953, 58–37–8(4)(a).

2. Constitutional Law ⇐50

Constitutional provision that the powers of government shall be divided into three distinct departments and that no person charged with the exercise of powers properly belonging to one of those departments shall exercise any functions appertaining to either of the others except in cases expressly directed or permitted is intended to prohibit the concentration of legislative and executive powers in one person. Const. art. 5, § 1.

3. Constitutional Law ⇐62(1)

Since inhibitions of constitutional prohibition against any person charged with exercise of the powers of one department of government exercising any functions appertaining to either of the other two departments of government are directed toward specific persons, there is nothing to restrain legislative department from creating administrative bodies to exercise legislative functions. Const. art. 5, § 1.

4. Constitutional Law ⇐60

Intent expressed by constitutional prohibition against any person who is charged with the exercise of powers properly belonging to one of the three distinct departments of government from exercising any functions appertaining to either of the other two is not to proscribe delegation of legislative power but rather to prevent those who exercise power assigned by the constitution to their department from aggrandizement of their power, however derived, by exercising functions appertaining to another department. Const. art. 5, § 1.

5. Constitutional Law ⇐62(1)

Constitutional prohibition against any person who is charged with the exercise of powers properly belonging to one of the three distinct departments of government from exercising any functions appertaining to either of the other two is not directed towards the delegation of legislative power per se but proscribes the conferring of legislative functions on specified persons in the executive department to avert any potential for tyranny by concentrating power in those individuals. Const. art. 5, § 1.

6. Constitutional Law ⇐62(5)
Drugs and Narcotics ⇐43

Provision of a Controlled Substances Act that the Attorney General shall administer the act and may add or delete substances or reschedule all substances enumerated in the act is an unconstitutional delegation of legislative power to an individual charged with exercising powers of the executive department. Const. art. 5, § 1; U.C.A.1953, 58–37–3(2).

7. Drugs and Narcotics ⇐43

Provision of the Controlled Substances Act allowing the Attorney General to add or delete substances from the lists of controlled substances conflicts with provision of the criminal code abolishing common-law crimes and providing that no conduct is a crime unless made so by the criminal code or by other applicable statute or ordinance. U.C.A.1953, 58–37–3(2), 76–1–105.

Robert B. Hansen, Atty. Gen., William W. Barrett, Asst. Atty. Gen., Salt Lake City, Noall T. Wootton, Utah County Atty., Provo, for plaintiff and appellant.

Michael D. Esplin, Provo, for defendant and respondent.

MAUGHAN, Justice:

The state appeals from an order of the district court quashing an information filed against defendant. Defendant was charged with a violation of Section 58–37–8(4) D (a)(iii), U.C.A.1953, as enacted in 1972, that she altered a forged prescription for a Schedule II controlled substance, demerol. Conviction under this section provides the penalty for a felony in the third degree. We affirm.

In Section 58–37–4(3)(b), the substances which were determined by the legislature to be included in Schedule II were set forth. The substance, demerol, does not appear therein. The state asserted in a memorandum to the trial court that the attorney general had added demerol to Schedule II in accordance with the Utah Controlled Substances Act, Title 58, Chapter 37. Specifically the state claimed:

> . . . Since the adoption of the Controlled Substance Act, Demerol has been added to the controlled substance list, a true list being in the possession of Dr. Wesley Parish, a chemist, located at 815 West Columbia Lane, Provo, Utah [1]

[1] The trial court granted the motion to quash on the ground provisions in the Utah Controlled Substances Act under which the attorney general added demerol as a controlled substance were an unconstitutional delegation of legislative power Section 58–37–8(4) D (a), under which defendant was charged, provides:

> It shall be unlawful for any person knowingly and intentionally:
>
> * * * * * *
>
> (iii) To make any false or forged prescription or written order for a controlled substance, or to alter the same or to alter any prescription or written order issued or written pursuant to the terms of this act.

Thus a necessary element of the crime charged is that the proscribed conduct involves a controlled substance. Section 58–37–2(5) provides:

> The words 'controlled substance' mean a drug, substance, or immediate precursor in schedules I, II, III, IV, or V of section 58–37–4. . . .

Under the legislative design, one of the consequences of scheduling a substance is the determination of the penalty for the crime, viz., the penalties for acts proscribed under section 58–37–8(1) A and (5) E are more severe for controlled substances in schedules I and II than those in III, IV, and V. Section 58–37–3(2) provides:

> The attorney general of the state of Utah shall administer the provisions of this act and may add or delete substances or reschedule all substances enumerated in the schedule in section 58–37–4. . .

Thus power is conferred on the attorney general to define a crime, viz., to proscribe conduct not previously deemed criminal under the Controlled Substances Act, and to designate the penalty therefor by the scheduling of the substance.

Is the grant of power to the attorney general to amend, in effect, the act by adding, deleting or rescheduling a controlled substance unconstitutional? Article V, Section I, Constitution of Utah, provides:

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial, and no person charged with the exercise of powers properly belonging to one of these de-

1. Although the defendant specifically asserted the issue that demerol was not proscribed in Schedule II, the state did not proffer any evidence to show compliance with Sec 58–37–5(3) "every substance controlled by the attorney general to have effect shall be certified and filed with the office of the secretary of state The secretary of state shall keep a permanent register of the rules or controls certified"

partments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

The attorney general is a member of the Executive Department, Article VII, Section 1. He is the legal advisor of the State officers, Article VII, Section 18. In *Hansen v. Barlow*[2] this court ruled it is within the right of the attorney general, if not his duty, to bring suits to clarify the constitutionality of laws enacted by the Legislature if he deems it appropriate. Under the Controlled Substances Act, a person charged with the exercise of executive powers, which in the case of the attorney general, includes the duty to challenge the constitutionality of a law, is assigned a function[3] appertaining to the legislative department. The conflict is obvious, the person, who is to be alert to possible constitutional infirmities, is participating in the legislative process by determining an essential element of a crime and the penalty. By this act, the attorney general is consigned to the anomalous position of exercising a potential challenge to a law he has, in fact, amended.

[2] If Article V, Section 1, has any purpose it is to prohibit the concentration of legislative and executive powers in *one* person. The adherence to federal case law concerning the delegation of legislative power does not resolve the dilemma of interpreting Article V, Section 1, for there is no comparable provision in the Constitution of the United States.

As pointed out in 1 Davis, Administrative Law Treatise, Section 2.02, p. 79:

> The non-delegation doctrine is wholly judgemade. The Constitution provides merely: 'All legislative Powers herein granted shall be vested in a Congress of the United States . . .' The power is also granted 'to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers.' Some congressional powers must obviously be delegated, including the powers 'to . . . collect taxes,' 'to borrow money,' 'to coin money,' and 'to raise and support Armies.' Delegation was not discussed at the Constitutional Convention, except that a motion by Madison that the President be given power 'to execute such other powers . . . as may from time to time be delegated by the national Legislature' was defeated as unnecessary.

Davis points out as palpably unsound the assertion by the Supreme Court in 1911 that "the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense."[4] Davis contends the assertion that authority as to what the law shall be is not delegable is clearly false, for virtually every statute creating an administrative agency delegates authority to determine what the law shall be. Davis claims that the recent opinions of the Supreme Court have generally been reasonably frank in recognizing that the law making power is delegable.[5] More recently Davis has stated:

> The non-delegation doctrine is almost a complete failure. It has not prevented a delegation of legislative power. Nor has it accomplished its later purpose of assuring that delegated power will be guided by meaningful standards. More importantly, it has failed to provide needed protection against unnecessary and uncontrolled discretionary power. The time has come for the courts to acknowledge that the non-delegation doctrine is unsatisfactory and to invent better ways to

2. 23 Utah 2d 47, 456 P.2d 177 (1969)

3. In *State ex rel Black v Burch*, 226 Ind 445, 80 N E 2d 294, 302 (1948) the court, in interpreting a constitutional provision similar to Article V, Sec 1, observed that the words "power" and "functions" were interchangeable, but if there be any distinction the term "functions" would denote a broader field of activities than the word "power"

4. Id p 77.

5. Id p 78.

protect against arbitrary administrative power.[6]

The delegation doctrine in this jurisdiction is not judge-made law but has a foundation in our state constitution. However, the express language in Article V, Section 1 is addressed specifically to another aspect of the delegation than that developed in the federal case law.

[3] In this case the prohibition of section 1, is directed to a "person" charged with the exercise of powers properly belonging to the "executive department." The Constitution further specifies in Article VII, Section 1, the persons of whom the Executive Department shall consist. Thus it is the "persons" specified in Article VII, Section 1, who are charged with the exercise of powers belonging to the Executive Department, who are prohibited from exercising any functions appertaining to the legislative and judicial departments. Since the inhibitions of the Article V, Section 1, are directed toward specific "persons," there is nothing to restrain the legislative department from creating administrative bodies to exercise legislative functions, viz., rule making. Although administrative bodies are nominally designated a part of the executive branch, they do not fall within the Constitutional definition of the Executive Department and the prohibition of Article V, Section 1 does not apply thereto.

[4] The intent expressed in Article V, Section 1, was not to proscribe the delegation of legislative power, although under Article VI, Section 1, there are limitations in this regard, but to prevent those, who exercise the power assigned by the Constitution to their department, from aggrandizement of their power, however derived, by exercising functions appertaining to another department.

The purpose of the provision is aptly expressed in Story, on the Constitution (5th Ed.), Section 523, p. 392:

> And the Federalist has with equal point and brevity remarked, that 'the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may be justly pronounced the very definition of tyranny.'

[5] In essence, Article V, Section 1 is not directed towards the delegation of legislative power per se but proscribes the conferring of legislative functions on specified persons in the executive department to avert any potentiality for tyranny by concentrating power in these individuals.

[6] The other aspect of this case which merits response is whether the Controlled Substances Act has improperly delegated legislative power. The State through the attorney general, contends the statute confers no more than the traditional administrative powers. This court has reiterated the Legislature may:

> . . . provide for the execution through administrative agencies of its legislative policy, and may confer upon such administrative officers certain powers and the duty of determining the question of the existence of certain facts upon which the effect or execution of its legislative policy may be dependent.[7]

On the other hand, this court has stated:

> The Legislature is not permitted to abdicate or transfer to others the essential legislative function with which it is thus vested. . . .[8]

In *Western Leather and Finding Company*[9] this court observed that the imposition of a tax and the designation of those who must pay the same is such an essential legislative function as may not be transferred to others. In *Tite v. State Tax Com-*

6. Davis, Administrative Law Treatise, 1970 Supplement, Sec 2.00, p. 40

7. *Clayton v Bennett*, 5 Utah 2d 152, 298 P 2d 531, 535 (1956), *Rowell v. State Board of Agriculture*, 98 Utah 353, 358, 99 P 2d 1 (1940)

8. *Western Leather and Finding Co v State Tax Commission*, 87 Utah 227, 231, 48 P 2d 526, 528 (1935)

9. Note 8, supra

mission[10] this court ruled that giving to the Tax Commission the power to determine in its own judgment the amount of the penalty was a legislative function which could not be delegated. In *State v. Johnson*[11] this court held that under the Constitution, the courts may not denounce and punish as crimes acts and omissions not made punishable by statute, for it is a legislative power to declare acts as crimes and to prescribe proper penalties.

[7] The constitutional standard set forth in *State v. Johnson* is incorporated in the Utah Criminal Code. Section 76–1–105, as enacted in 1973, amended 1974, provides:

> Common law crimes are abolished and no conduct is a crime unless made so by this code, other applicable statute or ordinance.

The Controlled Substances Act, is in conflict with this provision, for under the act, conduct may be made a crime, by an administrative ruling certified by the attorney general and filed in the office of the secretary of state, Section 58–37–5.

Most recently, in *Belt v. Turner*[12] this court stated:

> The power of the legislature to repeal or amend the penalty to be imposed for crime is not a matter of judicial concern. It is part of the sovereign power of the state, and it is the exclusive right of the legislature to change or amend it; . . .

Thus this court has recognized there are certain *essential legislative functions* which cannot be transferred to others.

This issue is reflected in 1 Davis, Administrative Law Treatise, Section 2.02, pp. 80–81:

> Possibly the most helpful early history is a distinction drawn by Chief Justice Marshall: 'It will not be contended that Congress can delegate to the courts or to any other Tribunal, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. . . . The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.' If the Supreme Court had consistently followed this lead, the law of the subject might be much more satisfactory.

The state does not cite any case wherein conduct not previously deemed criminal has been so denounced and the penalty set through the administrative process.

The instant case must be distinguished from *United States v. Grimaud*,[13] wherein the court ruled there was not an unconstitutional delegation of legislative power to the Secretary of Agriculture. The secretary was granted power to make rules and regulations covering forest reservations. Congress made it a crime to violate the rules and regulations made by the secretary pursuant to the authority granted in the statute. The secretary made a rule forbidding stock grazing on the forest reservation without a permit. The issue before the court was whether the forest reserve act of 1897 was unconstitutional, insofar as it delegated to the Secretary of Agriculture power to make rules and regulations, and made a violation thereof a penal offense. The court stated:

> . . . The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and from harmful uses. He is authorized 'to regulate the occupancy and use and to preserve the forests from destruction.' A violation of reasonable rules regulating the use and occupancy of the property is

10. 89 Utah 404, 416–417, 57 P 2d 734 (1936)

11. 44 Utah 18, 26, 137 P 632 (1913).

12. 25 Utah 2d 380, 381, 483 P 2d 425 (1971)

13. 220 U S 506, 31 S Ct 480, 55 L Ed. 563 (1911)

made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty.

. . . The Secretary did not exercise the legislative power of declaring the penalty or fixing the punishment for grazing sheep without a permit, but the punishment is imposed by the act itself. . . .[14]

In the Controlled Substances Act, the administrator not only determines that a substance should be controlled, he further schedules the substance, which in effect, declares the magnitude of the penalty and fixes the punishment. The administrator is exercising an essential legislative function which cannot be transferred to him.

A challenge similar to the instant one was made in *Howell v. State*,[15] wherein it was urged that the Mississippi Controlled Substances Act was unconstitutional insofar as it conferred on the State Board of Health authority to schedule or reschedule a controlled substance. The state argued the legislative grant of authority was proper since the Board was given only fact-finding authority to classify dangerous substances and was provided with guidelines for making its determinations. The court observed that the question of the validity of the grant of authority arose because, under the Uniform Controlled Substances Law, the penalties prescribed for violations are inextricably tied to the various schedules. The court said:

. . . The practical effect of moving a substance from one schedule and placing it in another is to increase or diminish the criminal penalty for violation of the act. It is likewise true that, if substances are added to or deleted from any of the schedules such action makes acts pertaining to the substances so added a crime, and as to substances deleted, abolishes a crime. The result is that the State Board of Health is given the authority to define a crime, and ordain its punishment.

The exclusive authority of the legislature to define crimes and fix the punishment therefor is without question.[16]

The court cited case law from Mississippi, with rulings similar to those cited herein in *Tite v. State Tax Commission*, note 10 supra, and *State v. Johnson*, note 11, supra. The court cited case law from other jurisdictions wherein it has been held the power to define crimes and the punishment therefor is vested in the legislature.

The court held that the authority to define crimes and fix the punishment therefor is vested exclusively in the legislature, and it may not delegate that power either expressly or by implication, but must exercise it under Article 4, Section 33 of the Constitution of Mississippi.[17]

In *United States v. Pastor*[18] the defendant argued that the federal act (Drug Abuse Act, 21 U.S.C. Section 811) granting authority to the attorney general to schedule controlled substances constituted an unconstitutional delegation of legislative authority. Although the court cited *United States v. Grimaud*,[19] it overlooked the qualification set forth, viz., that Congress not the administrator had set the penalty. The court acknowledged the ruling in *Howell v. Mississippi*, but declined to follow it, noting that the anti-delegation doctrine had retained much greater vitality in the state courts than it had in the federal courts.

There are sound reasons for ruling the definition of a crime and the precise punishment therefor to be essential legislative functions, which cannot be transferred. Criminal trials would be unduly complicated, for the defendant would have the right to challenge the administrative procedure and the findings where a substance has been scheduled or rescheduled. A similar

14. at pp. 522–523 of 220 U.S., at p. 485 of 31 S.Ct.

15. Miss., 300 So.2d 774 (1974).

16. at pp. 779–780 of 300 So.2d.

17. This provision vests the legislative power in the legislature.

18. 419 F.Supp. 1318 (1976).

19. note 13, supra.

determination by the legislature could not be challenged. The administrative rulings are not statutes and are not incorporated into the code, a person who wishes to abide by the law would have to resort to the permanent register kept by the secretary of state to determine the status of a substance.[20]

There is a certain peril involved if administrative procedures can be applied to the criminal law. Why couldn't an administrator revise the penalties in Section 76–6–412, according to the consumer price index or a determination that there had been an excessive amount of theft of property valued at less than $100. A determination of the elements of a crime and the appropriate punishment therefor are, under our Constitutional system, judgments, which must be made exclusively by the legislature.

WILKINS and HALL, JJ., concur.

CROCKETT, Justice (concurring separately).

I concur in affirming the ruling of the district court that there is no proper foundation for charging the defendant with a crime for possession of "demerol" as a controlled substance. But I have reservations about some aspects of the main opinion and therefore state my own reasons for my conclusion.

It is to be conceded that the legislature cannot delegate legislative powers to executive or administrative officers or departments. However, it is also to be realized that due to the complexities of human society, which are ever increasing, the function of the legislative branch must necessarily be that of a general policy making body and that it cannot spell out all of the details of the administration and application of law. Consequently, it is necessary that the executive branch (e g., administrative agencies such as the Public Service Commission, the Industrial Commission and the Tax Commission), in order to carry out the responsibilities imposed upon them, have the power to make rules and regulations that must be complied with, and that failure to comply must have sanctions or penalties, and that they therefore must have the force of law.

Even though the legislature cannot delegate the power to make laws to an executive officer,[1] it may enact laws which take effect upon the ascertainment of certain facts and conditions, and may delegate the duty to determine the existence of such facts to executive or administrative officers.[2] Whether a particular delegation of power is valid depends upon whether the legislature has prescribed sufficient standards or limitations to guide the exercise of that power in accordance with its will.[3]

It is a cardinal principle of due process that a person is entitled to reasonable notice, or a means of knowing, what conduct is prohibited before he can be held criminally responsible for engaging in it.[4] In conformity therewith the procedure for the adoption of such a rule, and the rule itself, must be of such a nature and sufficiently clear and definite that persons of ordinary intelligence who would abide by the law will know how to conform to its requirements.[5]

Consistent with the foregoing, the legislature has authorized the Attorney General to carry out the policy of the Act under appropriate safeguards U.C.A 1953, sections 58–37–3 through 7 list various factors for the Attorney General to consider in determining whether to control a substance. These include the potential of the substances for abuse, or a history and current pattern of

20. Here, apparently one would need to search out a chemist in Provo, Utah

1. *Young v Salt Lake City*, 24 Utah 321, 67 P 2d 1066 (1902), *Rowell v State Board of Agriculture*, 98 Utah 353, 99 P 2d 1 (1940)

2. Id , 16 C.J S Constitutional Law § 138

3. *Rowell v State Board of Agriculture, supra* note 1

4. *State v Timmons*, 12 Wash App 48, 527 P.2d 1399 (1974)

5. *Greaves v State*, Utah, 528 P 2d 805 (1974), *U S v Harriss*, 347 U S 612, 74 S Ct 808, 98 L Ed 989

abuse, whether the substance is controlled under federal law and whether it is an immediate precursor of a substance already controlled under the Act; and the current state of scientific knowledge of the substance and the effects of its use.

In regard to the requirement of notice to the public, Section 58–37–5(3) provides:

> every substance controlled by the attorney general *to have effect* shall be certified and *filed with* the office of *the secretary of state.* The secretary of state shall keep a permanent register of the rules or controls certified [Emphasis added]

It should be obvious to anyone reading those statutes, conferring such powers on the Attorney General, that in order to meet the requirements of due process of law, there must be compliance with the requirements, both as to the certification, and the filing in the office of the Secretary of State the statement as to any drug so prohibited, so that there is notice in that public office, where it can be examined by anyone who has an interest therein.

As indicated in the main opinion, the State did not establish that the statutory requirements above referred to had been complied with; and particularly it was not shown that there had been the filing with the Secretary of State; but there was some evidence indicating to the contrary. In view of that failure there is no foundation upon which to conclude that the Attorney General's designation of demerol as a controlled substance provides a valid basis for charging and prosecution for crime For these reasons I join in affirming the trial court's decision.

ELLETT, Chief Justice (dissenting)

The legislature listed 120 drugs as "controlled substances,"[1] i. e. substances that the Secretary of Health, Education and Welfare or the Attorney General of the United States has found after investigation and by regulation designated as habit forming because of their effect on the central nervous system, or which has a potential for abuse because of their depressant or stimulant effect on the central nervous system; or which has a hallucinogenic effect on the user.

The legislature sought to control the use of all such drugs and thereby protect those of its citizens who might use them to their own damage and harm. It realized that there might be other harmful substances not then known which would be equally dangerous to users and so a provision was inserted into the law[2] that authorized the Attorney General of the State of Utah to add such substances to the list of proscribed drugs.

The authority thus given to the attorney general is not, in my opinion, a delegation of legislative powers. He is strictly limited in his determination as to whether the substance is injurious to the user. The substance must be of one of the classes set out in the statute. Notice of a hearing to determine whether the new drug should be placed on the list is required to be given, and the right to be heard must be afforded to all interested persons. The statute[3] provides that any person who is, or who may be, affected by a designation of any such listed substance has a right to a judicial determination of the validity of the rule or control by filing an action for declaratory relief in the district court of Salt Lake County. The court may also declare the rule invalid for a substantial failure to comply with the provisions of the act relating to the procedure for ascertaining the classification of the new drug.

The pivotal question in this case is, therefore, whether the power of the attorney general to add drugs to the controlled substances schedule is a grant of an unconfined, vagrant power; or whether his function is merely to determine the facts upon which legislative policy depends and to exercise discretion in a narrow area defined by ascertainable standards.

1. U C A , as amended, 58–37–4

2. U C A , as amended, 58–37–3

3. U C A , as amended, 58–37–5(b)(7)

The appropriate test to be applied in determining this question was articulated in the concurring opinion of Justice Wolfe in *Revne v. Trade Commission:*[4]

> To require rigid and minutely defined standards or guides where the matters to be regulated are of such a nature as to require flexibility, might prevent needed remedies. Otherwise, the legislature would be required to anticipate all possible situations which might arise and itself supply a rule or guide to fit each such situation, a requirement which might be palpably impossible.
>
> Roughly, the measure of the detail content of standards or guides is what the matter or subject to be regulated will practically admit of. Otherwise, the legislature could not exercise its power to regulate what might acutely need regulation because the diversity and complexity of the regulative problems involved, would not practically admit the setting of sufficiently detailed standards.

This standard was applied by this Court in *Clayton v. Bennett.*[5] In that case, plaintiff attacked the constitutionality of a statute relating to the licensing of architects because, *inter alia,* it was an unlawful delegation of legislative authority. In upholding the statute, this Court noted:

> . . . certain basic qualifications relating to education, age, moral character and the requirement of satisfactorily passing an examination are set forth in the statutes. It seems obvious that the legislature could go no further than to set up such general standards.

To resolve the question of the constitutionality of the statute in this case, all that remains is to determine if the attorney general's power to add drugs to the controlled list is subject to those rules and guides that the legislature could be reasonably expected to provide.

It seems to me that there is no merit to the contention that there exists in the law any denial of equal protection or of any unconstitutional delegation of authority.

I would reverse the judgment of the trial court and remand the case for trial on the merits.

4. 113 Utah 155, 186, 192 P.2d 563, 579 (1948)

5. 5 Utah 2d 152, 156, 298 P 2d 531, 534 (1956).

DIRECT IMPORT BUYER'S ASSOCIATION, Plaintiff and Appellant,

v.

K. S. L., INC., Defendant and Respondent.

No. 14908.

Supreme Court of Utah.

Nov. 22, 1977.

Suit was brought against television station for alleged falsehoods broadcast whereby product sold by plaintiff was stated to be less efficient as a gasoline saver than plaintiff claimed it to be. Following reversal of summary judgment for defendant, 538 P.2d 1040, the Third District Court, Salt Lake County, G. Hal Taylor, J., directed a verdict for defendant at the conclusion of the evidence, and plaintiff appealed. The Supreme Court, Ellett, C. J., held that: (1) in case of alleged defamation of a product of a business, special damages must be alleged and proved, plaintiff must prove that the product is not as represented by defendant but is in fact as plaintiff claims it to be, and actual malice must be shown; (2) newscaster cannot be held liable for accurately reporting erroneous information when he believes the source to be reliable and truthful; (3) in the instant case, in which there were no false statements made, aside from repeating erroneous sales figures given reporter by plaintiff's product manager, and in which the effect of the statements was simply that claims made about plaintiff's